

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

MICHAEL DOUGLAS STURGIS,

Defendant-Appellant.

UNPUBLISHED

September 15, 2005

No. 254348

Emmet Circuit Court

LC No. 03-002147-FH

Before: Bandstra, P.J., and Neff and Donofrio, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of engaging in child sexually abusive activity, MCL 750.145c(2); possession of child sexually abusive material, MCL 750.145c(4); accosting a child for immoral purposes, MCL 750.145a; and fourth-degree criminal sexual conduct, MCL 750.520e. He was sentenced as a second habitual offender, MCL 769.10, to ten to thirty years' in prison for child sexually abusive activity, and to lesser, concurrent sentences for the other crimes. Defendant appeals his convictions as of right. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant's first two convictions stem from the making and possessing of a videotape portraying him engaged in sexual acts with a sixteen-year-old female. Defendant's other two convictions stem from his conduct with a second complainant, a fourteen-year-old friend of the first. Defendant grabbed the second complainant's clothed breasts and buttocks, and requested that the second complainant engage in intercourse with him and the first complainant.

Defendant contends that his trial counsel was ineffective for failing to move to sever the charges relating to the different complainants into separate trials. Because defendant did not request a hearing pursuant to *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), he has failed to properly preserve this issue for appeal. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). Therefore, this Court's review is limited to mistakes apparent on the record. *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003).

Effective assistance of counsel is presumed, and defendant bears a heavy burden of proving that his counsel's performance fell below an objective standard of reasonableness that denied him a fair trial. *People v Noble*, 238 Mich App 647, 661-662; 608 NW2d 123 (1999). Defendant has not borne this burden, because he has not established that he was entitled to

severance of the charges against him. See *People v Abraham*, 256 Mich App 265, 271-272; 662 NW2d 836 (2003); *People v Duranseau*, 221 Mich App 204, 208; 561 NW2d 111 (1997). Here, defendant used his relationship with the sixteen-year-old female to perpetrate the child sexually abusive acts, and to have contact with the fourteen-year-old female. The relationship and access to the fourteen-year-old female could be characterized as a continuous series of events, like that leading to the properly joined charges in *Abraham*. *Id.* Further, much of the same testimony would have been necessary to establish the elements of the charges relating to either complainant, and would have been admissible at separate trials. See *Duranseau*, *supra* at 208. One may question retrospectively that a discretionary motion to sever would have been successful, but such a question does not require a finding and we do not find that defense counsel's failure to bring such a motion was a clear mistake. Therefore, defendant has not established that his trial counsel's failure to move to sever the charges was objectively unreasonable.

Next, defendant contends that his trial counsel was ineffective for failing to challenge for cause a juror who was ultimately impaneled. Counsel's performance during jury selection is generally presumed to be a matter of trial strategy, and cannot constitute ineffective assistance unless it results in an obviously unfair trial. *Miller v Webb*, 385 F3d 666, 672-673 (CA 6, 2004). Here, defense counsel successfully challenged two prospective jurors for cause and exercised peremptory challenges to exclude another four jurors. With respect to the impaneled juror, defendant cites as his basis for the claim of ineffective assistance of counsel, counsel's failure to challenge for cause the juror who during voir dire agreed with another prospective juror's statement that, "a child would be truthful" when giving testimony.

A defendant has a right to an impartial jury, and this right is denied when a juror that is removable for cause is allowed to serve on the jury. US Const, Am VI; Const 1963, art I, §20; *People v Daoust*, 228 Mich App 1, 8-9; 577 NW2d 179 (1998). Prospective jurors may be challenged for cause if they are biased against a party, demonstrate a state of mind or opinion that would prevent them from rendering a just verdict on the facts presented, or have opinions that would improperly influence a trial verdict. MCR 2.115(D)(3)-(5); *People v Lee*, 212 Mich App 228, 249-251; 537 NW2d 233 (1995). The thought that a child would testify truthfully is nothing more than a belief in a vacuum. Alone, it does not demonstrate bias against a party, state of mind or opinion that would prevent a fair and just verdict on presented facts, or an improper influence on the deliberative process. Answers to other questions were balanced, for example, that people are responsible for their actions, regardless of age. With answers like those received from the impaneled juror as compared to those utilized by counsel in invoking both for cause and peremptory challenges, defense counsel may have included her on the jury as a matter of trial strategy. Defendant has not demonstrated that the juror could have been properly challenged for cause, or that he was not denied a fair trial on the basis of the person's inclusion on the jury.

Affirmed.

/s/ Richard A. Bandstra
/s/ Janet T. Neff
/s/ Pat M. Donofrio